United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

To be argued by
Michael F. Armstrong

76-1435

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UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 76-1435

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN M. KING and
A. ROWLAND BOUCHER,

Appellants

On Appeal from the United States District Court
For the Southern District of New York

REPLY BRIEF FOR APPELLANT KING

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STATEMENT OF FACTS

Appellant King has set forth in his main brief the facts which he asks the Court to take into account in judging this case. No substantive reply is necessary or possible to the Government's 37 printed page version of the facts and appellants address no argument to sufficiency of the evidence.* Appellants earnestly maintain their innocence and contend that the evidence viewed as a whole, as a conscientious jury would view it, is so tenuous and unreliable as to make it particularly necessary for the Court to examine errors committed during trial.**

The Government's factual statement, similar to its proof at trial, is, in the prosecutor's word, a "mosaic" -- made up chiefly of irrelevant parts. Of 30 pages devoted to the Government's case, only six deal with the central Mecom transaction while twice that number is spent discussing aborted transactions preliminary to the Arctic contracts and the Bennett King and Consolidated Oil and Gas ("COG") transactions.

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* Appellants concede that the contradictory melange of six-to-nine year old evidence can be marshalled to prove almost anything and recognize the futility of a sufficiency argument when the evidence must be viewed in a light most favorable to the Government.

** It is respectfully submitted that the trial court's characterization of the proof as "powerful to the point of near certainty" (App. 29) must be discounted by this Court. The remark was set forth in an opinion dealing with post-trial motions where it was not necessary to the Court's ruling and served to place on the record an assessment which, whether consciously intended or not, could help to protect the judge from reversal (in a case where he conceded that he may have committed error) (App. 1326).

Because of the lengthy discussion of these matters in the Government's brief, it is necessary to comment about some of them.

1. Preliminary Matters

Raff: The Government interprets a business disagreement between KRC and Robert Raff in 1968 as a precursor of the fraud alleged in the indictment (G. Br. at 5-7). This dispute involved a purchase occurring eight years before trial and amounted to a case in itself. Defendants did not have the resources to defend this separate action on the merits. Nevertheless they demonstrated that Raff had confirmed the terms of his purchase to FOF's auditors and had not sought to take a contrary position until a time came when he faced financial difficulties and when KRC, because of its liquidity crisis, was no longer an attractive source of business for him. Robert Raff's testimony, upon which the Government totally depended, was undercut by his admission on cross-examination that SEC investigator Thomson Von Stein had pressured him into giving favorable testimony by urging that such testimony would be in his own financial interest (Tr. 802-03, 809-10).

Swearingen: A meeting in the fall of 1969 between John M. King and J. E. Swearingen, Chairman of Standard Oil of Indiana, was presented at trial as an attempt by King to make an under-the-table deal. Swearingen and King had become bitter enemies at about this time over a dispute involving

drilling rights in the Middle East* and it was this dispute that King maintained was discussed in their private conference. There was no independent evidence to support either man's version.**

The details of this conflict are too complex and irrelevant for extended treatment here, but it is important to note that Swearingen testified that he was not told of King's purpose in wanting an inflated price offset by a kickback (Tr. 2585). Without a tie-in to the revaluation, a "wash" transaction of this kind makes no sense -- why not simply lower the price by the amount of the kickback -- unless King was supposed to be offering the kickback to Swearingen personally, as a bribe. It is preposterous to think that King, a relatively small independent operator, would approach the chairman of a $10 billion giant oil company, with which he was then involved in what was literally a shooting war, and suggest, without giving any reason, that the

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* King represented the Israeli government in attempts to drill for oil in the Gulf of Suez where Standard Oil had permits from Egypt (Standard's Egyptian operations represented most of its foreign business (Tr. 3471-72)). After King's drilling rigs had been strafed and a drilling barge had been blown up, the Israelis retaliated by blowing up an Egyptian oil refinery (Tr. 3471). Swearingen testified at trial that King was a "claim jumper" who was "trespassing on our property" and, while denying that he felt any hostility towards King, he confessed to "annoyance". (Tr. 2601)

** Contrary to the Government's assertion that the notes of Richard Farrell, currently working for Swearingen as Vice President of Standard Oil, corroborated Swearingen, the notes make no mention of any discussion regarding the Arctic or an "under-the-table" deal.

company make a purchase at an artificially high price in return for a personal kickback.

Gordon and Halbouty: The Government further attempts to bolster its argument that King was peddling side deals by pointing to evidence of offers to Robert Gordon and Mike Halbouty (G. Br. at 10-11). However, Gordon, a relatively small independent operator, would have been (unlike Swearingen) precisely the kind of person who would be susceptible to a kickback offer, and yet none was made. No implication can be drawn from the offer to Halbouty, since there is no evidence other than the mere fact that the offer was made and rejected.

The Origin of the Revaluation: The Government tries to make it appear that the revaluatio of the Arctic was a deliberate scheme by King to cover up the deficiencies in KRC's performance as a "fund manager" (G. Br. at 5). This presentation is an outright distortion of the record. KRC was not a proprietary fund manager (Tr. 1443), and the revaluation was FOF director Alan Conwill's idea (Tr. 114-15, 322). King testified, without contradiction, that he was opposed to the revaluation sale, but agreed to undertake it because Cowett asked him to (Tr. 3453-58). There is nothing in the record to indicate that the idea for a revaluation came from King or anyone connected with him, and the Government's attribution of such an origin for the revaluation was utterly baseless (and highly prejudicial when presented to the jury at trial).

2. Bennett King.

The obsessive nature of the Government's thinking is well illustrated by its continued insistence that the sale of a small Arctic interest to Bennett King was part of the alleged revaluation conspiracy (G. Br. at 23-24). Ticking off a list of supposedly suspicious coincidences (defendants evidence, fully meeting these suspicions, cannot be repeated here within the space alloted), the Government did not call a single affirmative witness or put in a single document which in any way indicated that the sale was not bona fide. If the Government claims that John King's object was to find purchasers who appeared to be acting at arms-length, the last person he would have sought would have been Bennett King, a director of KRC, who was obviously not eligible as an arms-length buyer for revaluation purposes. The trial court omitted the Bennett King transaction in instructing the jury as to the Government's allegations (App. 1438).

3. COG

Unlike the Bennett King transaction, the one with COG was substantial. The Government's proof, however, was again nothing more than surmise and suspicion, without a single live witness or a single probative document to support its speculation -- except a newspaper reporter to whom COG president Harry Trueblood supposedly made a "confession" in the course of an interview which he knew would be reported in the Wall Street Journal the next day.

The Government's discussion of the COG transaction is filled with unwarranted speculation and inaccurate contentions. Some of these require comment.

Preliminaries: The Government states that in nine years COG "neither purchased from nor sold" any oil or gas interests to KRC and suggests that the 1969 Arctic contract was, therefore, "curious" (G. Br. at 17).* In fact, there had been a number of perfectly routine business transactions between the two companies (Tr. 2469), some involving substantial oil and gas properties (Tr. 1632-37), and one of which was a massive joint real estate project which had been initiated by King more than one year prior to the Arctic transaction (Tr. 1599, 1756-58).

The Government constructs a composite of unrelated testimony to misrepresent the reason for COG's first trying to buy an Arctic interest from Pan Arctic instead of KRC (G. Br. at 17-18). Contrary to the Government's assertion, the fact that KRC's properties were mostly under water was not discussed in this regard and, in any event, the relative value of land and water permits was not that clear (Tr 1742-45, 1785-87, 1856-57, 1944).

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* The citations for this statement are not precise. Trueblood testified that he did not recall any such transaction, but "might have entered into one" (Tr. 1643-44). COG financial vice president Harold Gutjahr testified that his search of COG records revealed records for no sale (Tr. 2468).

Negotiations: In a familiar attempt to make normal business transactions appear suspect the Government misrepresents the KRC-COG negotiations leading to the Arctic contract (G. Br. at 18). The contract was not, as the Government claims, offhandedly suggested by Boucher in mid-December, and then pressed, for the first time, by King on the telephone (G. Br. at 18-19). It had been broached in October and already was the subject of a number of serious discussions at the staff level (Tr. 1601-08, 1742-52, 1929-31, 1945-46). The offers and counter-offers leading up to the signing of the contract were entirely routine and even the prosecutor cannot seriously suggest to this Court (regardless of what he tried to make the jury believe) that such things as the joint promotion of acreage to third parties and installment payments can constitute illegal secret side agreements (G. Br. at 18). The COG reservations regarding IOS were first raised by COG's counsel and, contrary to the prosecutor's implication, were based on purely business considerations (Tr. 1619-20).

Financing: King did not promise "to provide financing for COG's downpayment" and Boucher did not, as the Government implies, do so (G. Br. at 19). Since Trueblood was in Hawaii on vacation, Boucher agreed to introduce his people to a bank to arrange financing. A loan was arranged and paid back. Nothing about this financing (including the fact that KRC made a $1,000,000 accommodation year-end

deposit -- out of $40,000,000 such deposits made in various banks (Tr. 3900)) can conceivably be interpreted as irregular.*

Bristol Bay: The Government's discussion of the Bristol Bay, Alaska transaction is totally misleading (G. Br. at 19-21). Without benefit of a single witness, the Government theorizes that KRC repaid COG for the Canadian Arctic purchase by buying the Bristol Bay properties "at prices far above market value" (G. Br. at 20). KRC purchased two different kinds of Bristol Bay leases at $5 and $15 prices. In support of its contention, the Government claims that the $5 leases were worth $2 or $3 per acre in late 1969 or early 1970, a month or so prior to the sale. Such a price rise is impressive to a New York jury, but not to anyone familiar with the extreme fluctuations in price that are common in the oil business. Acreage in the same area was selling for $40 an acre about a year earlier and the price rise upon which the Government relies was easily explained by favorable publicity coming out at the time (Tr. 1764, 1777-79).**

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* This allegation has been calmed down a good deal since trial, where the prosecutor went to considerable lengths in attempting to blur the distinction between "providing financing" and introducing someone to a bank.

** A citation to a prediction in an "Alaskan petroleum publication" which provides the only other support for the Government's price theory, is a deliberate misquotation (G. Br. at 20n.). As was brought out clearly at trial, the $5 price mentioned in that publication (when some types of leases were sold to KRC for $15) was not for "leases in the Bristol Bay area", as the Government states, but was an average price for leases in an overall area containing, in addition to the Bristol Bay property, a vastly larger area nowhere near Bristol Bay (Tr. 1765-69).

KRC Western Division Manager Harry Cooper took the stand to testify that he had reviewed the Bristol Bay property for Boucher in the regular course of business and recommended the purchase (Tr. 1973-75).* He denied the hearsay interpretations of Arman Frederickson.**

The Government again miscites the record in claiming that after Trueblood "stoutly denied any recollection" of talking to Boucher about Bristol Bay in December 1969, he was "flatly contradicted" by COG's president William Booth (G. Br. at 20). Trueblood's "stout denial" (when asked if he discussed the matter) was: "I could have. I just don't recall that I did." (Tr. 1645). Booth's "flat contradiction" was "It was only briefly discussed ..." (Tr. 1932). When asked by whom, Booth said, "I don't recall that. It was either Mr. Trueblood or myself" (Id.) In any event, these kind of details of who remembers saying what to whom about a minor issue six years ago are hardly the stuff of which fraud cases should be made.

The "culmination" of defendants' scheme, as seen by the Government, was the sale of a 50% interest in the

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* The Government sets forth the date printed on the Bristol Bay contract, February 25, 1970, as indicating that Cooper's visit on March 2nd could not have taken place before the contract was signed. The contract, however, by its terms required the down payment to be paid upon execution and expressly acknowledged receipt of such payment. The check used to make the payment was dated March 9, 1970, 7 days following Cooper's review (G. Ex. 15E, p.1, D. Exs. BE, BF).

** The Government's objection to a question as to Cooper's opinion of Frederickson was sustained.

Bristol Bay properties to FOF at a 20% profit. This amounted to $100,000 and the whole Bristol Bay deal amounted to only $700,000. This was a peculiar quid pro quo for a $10 million "sham" transaction, particularly when, as mentioned in appellant King's main brief (pp. 11-12), there were $6 million worth of COG transactions that were rejected by KRC during this period which easily could have been vehicles for a more substantial repayment of the alleged favor represented by COG's Arctic purchase.

Ohio Loan. According to the Government, a "carefully concealed facet of COG's Arctic transaction was the surreptitious financing by the King complex of COG's second Arctic payment" (G. Br. at 21). The twisted ingenuity displayed by the Government with respect to this transaction is particularly unsavory because the prosecutor again offered no witnesses to prove his contention and blocked an attempt to put into evidence at trial sworn testimony by the principal in the deal.

The Government contends that David Kerr, president of Regency Management, a subsidiary of Colorado Corporation, was involved in a loan which resulted in KRC "financing" the COG payment. The money was loaned by the State of Ohio to COG which, in turn, loaned it to Regency Management. The loan was repaid to COG, which then used it to make its Arctic payment. COG repaid the State of Ohio in due course (Tr. 1815-16). It is mystifying how the Government can claim that Regency's simply repaying a loan to COG could possibly

amount to a "financing". David Kerr testified under oath before the SEC as to the totally routine nature of the transaction.*

There is not a breath of evidence linking John King or Rowland Boucher to any of these events, and Harry Trueblood's alleged misstatements before the American Stock Exchange (G. Br. at 22) are irrelevant to anything with which this case is concerned. As with the Bennett King transactions and the allegations about bank financing, the Court refused to present the Ohio loan to the jury as a Government contention. No instructions were given, however, to ignore the proof and the Government's insinuations with respect to it must have affected the jury.

There is little point in rehashing these facts, involving some of the various facets of peripheral proof upon which the Government dwells, except to show the unreliable nature of the Government's factual citations

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* Kerr had agreed to be a defense witness but, at the last minute, during the closing days of the trial, could not testify because of business commitments in Denver which he represented to be so important that if he did not keep them he would go out of business. The defense, lacking funds to place potential out-of-town witnesses under precautionary subpoenas (with the necessary tendering of travel expenses) had no way to force Kerr to come to New York to testify. Counsel sought, pursuant to Rule 804(b)(1) of the Federal Rules of Criminal Procedure, to introduce Kerr's prior SEC testimony on the grounds that he was unavailable and his testimony had been given under oath, in the investigation leading to this trial, before the very SEC lawyer who was sitting at the Government's counsel table. The Government objected to the introduction of the testimony, and the trial court excluded it.

and the degree to which speculation and theorizing replaced hard evidence during much of this trial -- the jury should have been permitted to focus on the transactions which were truly at issue.

4. The Mecom Transaction

As stated in appellant King's main brief, the only one of the Canadian Arctic transactions with respect to which the Government introduced any actual evidence of side deals was the sale to John Mecom. The purpose of the facts with respect to this transaction set forth in appellants previous brief was to show the confused and conflicting nature of the six-year old proof offered by the Government. There was not a single government witness who had any arguably important testimony with respect to the Mecom transaction who was not contradicted on one or more key points by his own prior testimony, the testimony of another government witness, or both.

In the light of the Government's presentation of the proof with respect to the Mecom transaction, it is worthwhile to highlight how fine are the distinctions upon which this case turns. In particular, the memorandum of February 10, 1970 (App. 1117), which John King prepared following his telephone conversation with John Mecom indicated that King was considering for the first time the possibility of assisting Mecom by agreeing to buy his Arctic interest from him.* Since Tim Lowry

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* The document, together with an earlier draft, was located by King's secretary quite by accident in 1975. Defense counsel turned it over to the Government well in advance of trial, and scientific tests failed to disclose any fabrication.
[Footnote continued on following page]

testified that the letter he sent to Neal Marriott reflecting

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Its authenticity was further confirmed by King's former secretary, who had typed both versions and who was subjected to cross-examination at trial. After cross-examining this witness, the prosecutor raised no contention that the documents were not genuine and was left only with the argument that while the memoranda might in fact have been prepared in February 1970, they did not accurately reflect the events in question.

The text of the memorandum is as follows:

"TIM LOWRY February 10, 1970

JOHN M. KING

RE TELEPHONE CONVERSATION WITH JOHN MECOM

I received a call today from John Mecom indicating that the recent publicity associated with his purchase of an interest in the Arctic permits of IOS has created an unexpected trauma with some of his lending and banking associations. They are strongly objecting to his making investments that go beyond the expiration of their note periods. He expressed concern that this might endanger some of his financial arrangements that he was seeking; and although he wanted the interest, it was relatively small by comparison with his other holdings.

I told him that if it became a serious problem I would certainly do everything I could to resolve it for him; that I myself might want to buy his interest after a year or two in the event it was still available, and that I would so indicate to him. Also, I advised that if it would help with his bankers I would so indicate to them and that if conditions were that I could not buy the interest personally, I would undertake to sell it on his behalf to others that might be interested, a number of whom have contacted me recently. He said he would let me know, and if necessary might have a lawyer prepare a draft of an agreement between us. I instructed him that should he do so to send it to you for your perusal.

Since this was an IOS interest, however, it seems to me we would have to get their permission for me to make any purchase from Mecom before any action could be taken. Also, if another purchaser comes into the scene, it would seem proper that they should be at least consulted.

JMK/ct"

a proposed buy-back (G.Ex. 1) might have been prepared as late as February 1970 (Tr. 1446), that letter might have been prepared in response to King's memorandum. Since Robert Hulsey had no knowledge of whether an agreement with Mecom ever was arrived at (Tr. 882-86, 888) and Neal Marriott was not only thoroughly discredited as a believable witness but also testified that there was no final meeting of the minds with respect to the supposed side agreement (Tr. 1023-25), the case came down to a question of whether John Mecom (whose memory for dates was such that he testified firmly that his bankruptcy was a year earlier than it really was) (Tr. 925-26) discussed the question of a buy-back agreement in December 1969, as he testified at trial, or in February 1970, as indicated in the King memorandum. If the latter was proven, and if Mecom was not believed when he said that his written contract with KRC was a sham, the defendants most assuredly would have been acquitted.

POINT I

THE MECOM BANKRUPTCY DOCUMENTS

The Government attempts to justify the trial court's peremptorily cutting off inquiry into John Mecom's bankruptcy statements by minimizing the importance of the evidence, misrepresenting the manner in which it was presented and unrealistically maintaining that the prejudice was cured by the tardy admission into evidence of three out of the ten relevant documents. In fact, the evidence was of crucial importance and was offered in a proper and orderly fashion. The perjorative manner in which it was excluded, preceded by the prosecutor's extensive and misleading re-direct examination, totally destroyed its effectiveness so that the later introduction of a few documents, without benefit of explanatory cross-examination, was meaningless.

A. The Mecom Bankruptcy Documents Were of Central Importance to Appellants' Case.

The Government attempts, as did the Court below, to minimize the impact of the exclusion of the Mecom bankruptcy documents by denigrating their relevance, specifically dwelling on the obvious fact that many of the lengthy exhibits "were primarily concerned with matters totally unrelated to Mecom's Arctic contract." (G. Br. at 40). Appellants are accused of having made an "inadequate showing that more than 200 pages of documents were brimming with inconsistent statements * * *" (G. Br. at 41).

This is a "straw man" argument since appellants attempted no such showing. Each of the ten exhibits was necessarily offered in its entirety since each was a document filed

in the Texas court and the authenticating seal and ribbon prevented the removal of individual pages. The inconsistencies upon which appellants relied were not, of course, to be found in the irrelevant portions of the exhibits, but consisted of specific entries and passages relating to the KRC Arctic contract. The trial court's inexplicable characterization of the documents as "of modest potential relevance" (App. 1404), upon which the Government relies (G. Br. at 41) is simply not consistent with the facts. (At that time the Court had not examined the documents and was hardly in a position to gauge their relevance.)

In sum, the exhibits showed: that despite a temporary cash shortage one year after the KRC Arctic contract, Mecom was in solid financial shape (App. 1062-63); that avoiding the KRC Arctic contract would have been of great importance to Mecom in working out his reorganization since this would have largely alleviated his temporary cash problems (App. 1062-63); that, despite the clear incentive he had to avoid the Arctic contract if he could, it was, from early December 1970 through early February 1971, considered to be a fully enforceable obligation (App. 911, 913, 934, 938-39, 940, 949, 957); that other contracts were challenged as unenforceable (App. 940, 942-46) but the Arctic contract was not; that not until mid-February, 1971 were attempts first made to undo the Arctic contract, but not on the ground that a side agreement made it a sham contract (App. 1015, 1062-63); that by spring 1971, the Arctic contract was considered valueless (App. 1089) but was described in papers submitted in

Federal court as a completely valid contract* (App. 1053-67 at 1062-63); and that at no time, in any of these papers, is any mention made of the side agreement which lies at the heart of the Government's case.

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* The documents (also described at pages 26-28 in appellant King's main brief) were as follows:

Defense Exhibit U is Mecom's Petition for Bankruptcy, filed December 3, 1970 and sworn to by Mecom. KRC is listed as a note creditor for $2,348,208 (App. 911). This figure represents the purchase price of the Arctic contract ($2,609,120) less the downpayment ($260,912) and is cited in subsequent papers filed by Mecom (App. 994, 1069). Under assets, non-producing leases are listed at $2,632,024 - the purchased Arctic interest (App. 913).

Exhibit V is a List of Creditors dated December 12, 1970. KRC is listed, without qualification, as a secured creditor (App. 934).

Exhibit W is a Schedule of Executory Contracts, filed December 23, 1970 and sworn to by Mecom. The KRC contract is listed and described in detail (App. 938-39) and the purchased interest is described as "working interest in certain designated permits as set out fully in the contract" (App. 938). There is no mention of any "side" agreements. In this document Mecom refuses to recognize as "subsisting" or "enforceable" two other listed contracts (App. 940) but takes no exception to the KRC contract.

Exhibit X is a Petition to Reject an Executory Contract, filed December 14, 1970. This petition (App. 942-46) challenged a contract other than the Arctic. Subsequent schedules continued to list the Arctic contract as an asset (App. 957, 994).

Exhibit Y is a List of Creditors dated February 8, 1971. KRC is listed, without qualification, as a secured creditor (App. 949).

Exhibit Z is a List of Assets filed February 8, 1971. The interest in the KRC Canadian leases is listed under nonproducing oil and gas leaseholds as an asset (App. 957).

Exhibit AA is a Detailed Schedule of Assets and Liabilities filed February 12, 1971. KRC is listed as the largest creditor holding securities. The value of the Arctic contract is listed at $2,609,120.50 (purchase price of the contract) and the amount due is $2,348,208 (App. 994) - the same amount as in the petition (D.Ex. U) (App. 911). A real estate schedule also lists the Arctic leases but notes that since Mecom was

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The story told by these documents -- solidly affirming the validity of the December 1969 written Arctic contract with KRC -- stands in stark contrast to Mecom's trial testimony that the Arctic contract was "no deal" and the written contract was a sham prepared for the benefit of accountants and lawyers (App. 1364-65). See 3A J. Wigmore, Evidence § 1040 at 1048 (J. Chadbourn ed. 1970). There can also be no doubt that Mecom's

[Footnote con'td from p. 17]

unable to purchase the interest by profits from drilling, negotiations were currently underway to cancel the transaction (App. 1015). The value of the leases at cost is listed as $2,609,120 (App. 1015).

Exhibit BB is a February 24, 1971 transcript regarding the first meeting of creditors. Mecom's counsel, Mr. Carmouche, gave a very rosy picture of Mecom's financial state (App. 1062-64), and cited the KRC contract as one of three claims which were of "doubtful" "legal merit", but said nothing about a side agreement (App. 1062), and stated that elimination of the KRC liability would result in minimal unsecured debt for Mecom (App. 1062-63). Mecom, under oath, agreed with Mr. Carmouche's statements (App. 1066).

Exhibit CC (App. 1068-82) is the Receiver's Petition Recommending Acceptance of a Compromise whereby KRC and Colorado Corp. would release Mecom from his liability (in excess of $10,000,000) under the Arctic contract. The terms of the KRC Arctic contract and the circumstances of the downpayment are described in detail in a May 21, 1971 letter to the Receiver's attorney from Neal Marriott, in which he says that the "proposed settlement has been discussed with and approved by ... Mecom" (App. 1076). These documents, prepared for submission to the Court, treat the Arctic contract as a bona fide transaction with no mention of any buy-back agreement (App. 1075-76, 1078).

Exhibit DD is the Receiver's List of Assets and their Appraised Value, filed July 9, 1971. The KRC leases are listed as having no value (App. 1089) as opposed to prior documents (D.Exs. U, AA) which listed the value at cost ($2,609,120) (App. 913, 994, 1015). There is still no mention of a side agreement.

trial testimony, which the bankruptcy documents contradict, was central to the Government's case. No witness or document other than Mecom purported to give direct evidence of a side agreement with John King. No other party to an Arctic contract testified to a side deal.*

The Government further argues that the documents were properly excluded because six of them were not personally signed or sworn to by Mecom but were prepared on his behalf by his bankruptcy attorneys (G. Br. at 39-40).** No authority is offered

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* The Government attempts to soften the significance of Mecom's testimony by claiming that it was "fully corroborated by Hulsey, Marriott, Lowry and a host of documents including King's guarantee letter" (G. Br. at 38). There is understandably no cite to the "host" of documents, because none exist which afford such corroboration. The terms of the "guarantee" letter (G.Ex. 1) (App. 799-800) are completely different from those to which Mecom testified and Mecom's lawyer, Marriott, testified that it did not reflect the agreement. Hulsey was unable to state whether any such agreement ever was consummated. Marriott's testimony was shot through with basic inconsistencies and seriously undercut by his expressed willingness to "agree to any statement of facts as long as it would get [Mecom] out of his difficulty" (Tr. 1069). Moreover, Marriott himself gave Arthur Andersen a letter confirming the validity of the written Arctic contract and wrote two letters to be filed in two different courts which specifically described the contract as a bona fide fully enforceable obligation (Tr. 1057-66; App. 1074-76, 1091-92, 1229-44). Lowry, who never met Mecom (Tr. 1432), functioned only with respect to Government Exhibit 1, which did not reflect Mecom's testimony, and Lowry had previously testified that the agreement referred to in Government Exhibit 1 had never been consummated (App. 1250-58).

** On re-direct examination Mecom testified that he had nothing to do with "preparing" documents not bearing his signature. The prosecutor did not direct his attention to the specific allegedly relevant passages. In any event, Mecom's self-serving statements should not have been relied upon to preclude the jury from evaluating the documents to see if he was telling the truth.

for the proposition that the jurors should have been deprived of the ability to decide for themselves the degree to which John Mecom was responsible for statements made on his behalf in a proceeding affecting him as vitally as his own personal bankruptcy. In a similar context involving statements made by a party's agent, Judge Augustus Hand found objection to such testimony to be "a most technical view of the situation," saying:

> "It would be strange to have a rule of agency binding a principal to unauthorized acts of an agent, when done within the apparent scope of his authority, and yet to adopt a rule of evidence which would exclude statements naturally made in the course of the agency." Slifka v. Johnson, 161 F.2d 467, 469 (2d Cir.), cert. denied, 332 U.S. 758 (1947).

See also Fed. R. Evid. 801(d)(2)(C),(D); United States v. Parks, 489 F.2d 89 (5th Cir. 1974); Hayes v. United States, 407 F.2d 189 (5th Cir.), cert. dismissed, 395 U.S. 972 (1969), where, in each case, a party was held responsible for statements made by an agent preparing his tax returns. There is no logical distinction, for this purpose, between party admissions and prior inconsistent statements. 4 J. Wigmore, Evidence § 1051 at 12 (J. Chadbourn ed. 1972).

B. The Trial Judge Committed Error in Excluding the Mecom Bankruptcy Documents.

The stated grounds for the Government's support of the exclusion of the Mecom bankruptcy documents is that the documents were allegedly offered in a confused 200-page pile without marking for the Government the particular inconsistent statements dealing with the Arctic contract. The assertion that the inconsistent portions were not marked is factually incorrect. Moreover,

when the documents were initially accepted into evidence the Government made no objection to the procedure followed by defense counsel in offering them. Nor did the Court give any indication that he thought that counsel was proceeding improperly until later, when he abruptly revoked his original decision to admit the documents, on the ground that they had been improperly introduced in the first place. Counsel found himself "mousetrapped" when the Court berated him for not having followed procedures which were now being suggested for the first time while refusing to allow him to correct the situation by following the Court's suggestions. A review of the steps taken by appellant's counsel in introducing the documents shows that there was no cause for the Court's sudden and arbitrary reversal of its ruling.

1. Relevant portions of the exhibits were clearly marked.

An important element in the prosecutor's contention that the bankruptcy documents were properly excluded because of the way in which they were offered is the allegation, repeated again and again, that the relevant inconsistencies were concealed in an undifferentiated mass of irrelevant material. No objection was made on this ground when the documents were offered. Nevertheless, the prosecutor now denies "... that the relevant portions of the documents had been marked ...", asserting, "the relevant portions of the documents were in no way brought to the prosecutor's attention" (G. Br. at 38n).

These statements are false. As noted above, the

authenticating seals and ribbons on the documents required that they be submitted in their entirety. Since relevant pages could not be removed, they were marked to show pertinent passages. One short (three-page) document was relevant as a whole and required no marking (D.Ex. X). The other nine documents contained a total of 16 entries of varying lengths which were pertinent to Mecom's cross-examination. Every one of these entries was clearly marked with a paper clip. The original documents, residing in the Court's file, contain, at the point of each relevant entry, either a paper clip or a distinct rust-marked indentation tracing the exact spot where a clip once was placed.*

This physical evidence corroborates the clear recollections of those on the defense team who had responsibilities regarding the documents, including the student intern who actually put the paper clips in place in preparation for Mecom's cross-examination. The documents were clearly marked in a manner obvious to anyone handling the documents, and the markings were pointed out to the prosecutor. It was for this reason, no doubt, that the prosecutor made no objection on this ground when the documents were offered for their inconsistent portions.

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* The clips, which are the only ones on the documents, were obviously affixed for the Mecom examination and not in connection with later proceedings since some of the clipped documents were not used at such proceedings. Paper clips (shown on xerox copies in the appendix) appear at: App. 934, 957, 1062, 1063, 1066, 1076, 1078, 1089. Indented rust marks (indicated by dotted lines) appear at: App. 911, 913, 938, 940, 949, 994, 1015, 1075.

The prosecutor's assertion here that defense counsel did not specify the inconsistent portions of the exhibits at trial is particularly surprising since it is contrary to his own statement during trial. In a memorandum opposing a later defense application, the prosecutor justified the trial court's exclusion of the exhibits by saying,

> "... the exclusion was predicated on the inadequate showing that the specified portions of the documents were in fact the statements of Mecom...." (Gov't Mem. Opposing Offer of Documents from Mecom's Bankruptcy Proceedings, p. 4, App. 762-70) (emphasis supplied).

Nowhere in this memorandum and, indeed, at no time during trial, did the prosecutor ever hint that he was, as he now says, unaware of the relevant portions of the documents. Lacking such information, this experienced prosecutor surely would have demanded to know what the documents were supposed to show, what portions of them were pertinent, what the paper clips meant and whether anything other than the Arctic contract was being referred to. He never made such demands because he had no need to.

2. The offer of the documents was properly made in accordance with the rules.

The offer of the bankruptcy documents was made in a perfectly logical and orderly fashion and the Government cannot now excuse the trial court's impatience by claiming that the Court was provoked.

Counsel began by marking each of the documents with the stamp of the Court and the appropriate exhibit numbers

(this was done at the outset and not, as the Government states, when it became "apparent" to the trial court that the exhibits were in "a state of disarray") (G. Br. at 45).

Counsel then asked the witness to identify the first document (D.Ex. U) and, when he did so, offered it. The prosecutor stated that he "probably" would have no objection but "would like a chance to look through it before [giving] the final word" (App. 1367). The prosecutor's representation clearly referred to all of the documents which defense counsel proposed to introduce. Therefore, defense counsel did not wait for a ruling on the first exhibit but began assembling the other exhibits comprising the offer.

The witness identified a second document (D.Ex. V) (App. 1367-68) and was asked to identify a group of four more (D.Exs. W through Z). At this point, the witness, not the prosecutor, objected and the Court asked that defense counsel make clear the purpose of the documents and what parts were relevant to the case (App. 1368-69). Counsel explained:

> "What I intend to do is show that there are representations made in these bankruptcy papers as to the Arctic contract, in which it is treated in the bankruptcy papers as a legitimate, binding contract, with no mention of any side agreements or anything having to do with any side agreements, up to a certain point in the bankruptcy, where the further papers show that there was a contest made for the first time where the contract was challenged, but not on the grounds that have been testified about in this proceeding." (App. 1369)

The Court was perfectly satisfied with this response - a completely accurate brief summary of the documents - and accepted

the exhibits in evidence without asking for any further elucidation. The prosecutor, also apparently satisfied, raised no objection (App. 1369-70).

The final four documents (D.Exs. AA through DD) were then routinely offered and received without objection, and with no further questioning of the witness (App. 1370). Defense counsel concedes that the assembling of these four documents did not go as smoothly as it might, but it is ridiculous that the Government finds this fact significant (G.Br. at 45).* The slight delay, coming at the end of the offer, had no bearing on the admissibility of the documents and the Government raised no objection. The Court expressed its impatience but said nothing to indicate any deficiency in the way the offer was being conducted.

3. The trial court wrongly excluded the documents from evidence.

The major ground given by the Court for its sudden exclusion of the previously admitted bankruptcy documents was that, in previously offering them, counsel had failed to "focus" clearly on the relevant portions of the documents. The Court complained - in front of the jury - that they would be misled and confused since defense counsel had given them no "enlightenment" about the "thick sheaf of papers". The reason for this confusion,

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* The documents which were to be offered in evidence were interspersed with other unrelated documents from Mecom's bankruptcy file which defense counsel did not offer. When the Government indicated no objection to a simultaneous offer of the exhibits dealing with the Arctic contract, counsel had to assemble all the documents in a group.

according to the Court, was defense counsel's failure "to focus on what is supposed to be the issue before us." (App. 1392).

As an explanation for the exclusion of the documents from evidence, this statement simply does not make any sense. A number of questions suggest themselves:

(a) Why did the trial court accept the documents into evidence in the first place? The bankruptcy documents were excluded because of alleged deficiencies in the way they were first offered, yet neither Court nor prosecutor expressed any reservations at the time. When the documents were offered, the Court asked defense counsel to address himself to the precise question which later formed the basis for his excluding the documents:

> "If the defendant is going to put in this whole sheaf of bankruptcy papers, I think it would help the jury and me to make clear their purpose and which parts of them are thought to be relevant to this case." (App. 1368-69)

Neither the Court nor the prosecutor gave any indication of dissatisfaction with defense counsel's reply, which stated generally the purport of those portions dealing with the Arctic contract and the way in which they were inconsistent with Mecom's testimony (<u>see</u>, p. 24, <u>supra</u>). If defense counsel's reply to the judge's question was inadequate and required the kind of detail the Government now claims was necessary, it was incumbent upon the Government or the Court to tell him so <u>then</u> so as to give him an opportunity to answer with more specificity.

(b) What more could have been done, after the initial

offer, to "focus" the documents? The Government, and the Court below, claim that counsel was deficient for failing to "focus" on the relevant portions of the bankruptcy documents not only during the original offer, but during the cross-examination which accompanied their admission and during the brief voir dire by defense counsel that was held in the course of the Government's re-direct examination.

There was, of course, no reason during that cross-examination for counsel to ask any questions directed to admissibility other than those which in fact resulted in the documents' being received in evidence.

With respect to the voir dire, there was little obligation if any even to have one. Four exhibits (D.Exs. U, W, AA, BB) were admissible as sworn statements. Fed. R. Evid. 801(d)(1)(A). The others (D.Exs. V, X, Y, Z, CC, DD) were prepared by Mecom's agents for his benefit in his personal bankruptcy (App. 1389-92). Any explanation Mecom might give could be considered by the jury in deciding what weight to give the documents, but should not operate to bar the exhibits entirely, particularly in the light of Mecom's obvious hostility and the evasiveness of his answers. See discussion supra, pp. 20-21.

In any event, there is nothing to the Government's complaint that "not a single question [was asked during voir dire] intend[ing] to establish what portions of [defendants'] raft of papers were inconsistent with Mecom's testimony" (G. Br. at 39). As stated above, there was no need to establish through testimony which portions of the documents were incon-

sistent because those portions were clearly marked and no one, including the Government in its re-direct examination, had raised the issue. The Government's questioning prior to its motion to exclude the documents did not focus on identifying the inconsistent passages, but upon Mecom's connection - or lack thereof - with all of the documents, the irrelevant as well as the relevant. Out of an excess of caution, counsel pointed out on voir dire that Mecom in fact had responsibility for the preparation of the documents, even though he did not prepare them himself. Counsel established the facts that Mecom's attorneys consulted with him in the preparation of the bankruptcy documents (App. 1389), that he read the documents that he signed (App. 1390), and that his attorneys discussed with him which claims to dispute and which ones not to dispute (id.). These answers were more than sufficient to meet the points raised by the prosecutor in his re-direct examination insofar as those points might possibly be relevant to the question of admissibility.

(c) How would the jury be misled or confused by the documents? The trial court gave no indication, prior to excluding the Mecom bankruptcy documents, that he found anything confusing or misleading about receiving in evidence lengthy documents containing specified relevant portions of interest to the jury. The Government introduced more than 350 exhibits in this case, many of which were so voluminous as to require hand trucks to carry them into the courtroom.

A number of these documents were bound and, like the Mecom bankruptcy documents, could not conveniently be taken apart. The Court, quite rightly, did not feel called upon to exclude these documents on the ground that they confused the jury, but instead followed the normal procedure for handling them. See, e.g., Tr. 401-03, 422-23, 430-32, 450-51.

This procedure is simple and effective. Each side is free to read to the jury those portions of the exhibits which it feels are relevant. If a party feels that portions of the exhibits are prejudicial, it brings that claim to the attention of the court and, if the court agrees, those portions are deleted before the exhibit is physically shown to the jury -- if it ever is. If a party wishes to have the jury examine particular relevant portions of the exhibits, he is free to underline or otherwise mark those portions or, if he prefers, he can prepare and offer in evidence subexhibits which can conveniently be distributed to the jury. No one worries about irrelevant but harmless material because, as the trial court said at another point in the trial, when it was the Government's turn to offer exhibits of this kind, "the jury is not going to read through all this material anyhow, except as you call it to their attention." (Tr. 432).

This procedure was being followed, as it had many times before during the case, when the trial court suddenly broke it off, reversed its ruling, excluded the documents and denied defense counsel the right to cross-examine Mecom about

them in response to the Government.*

The Government cites a number of cases in an attempt to legitimatize the Court's action. Appellants do not argue with those cases which stand for the general proposition that the trial court has wide discretion with respect to cross-examination (G. Br. at 42). However, the Government ignores the authorities cited in Appellant King's main brief with respect to limitations upon that discretion (King Br. p. 36).

The cases cited to support the Government's contention that the bankruptcy documents were properly excluded because they would confuse or mislead the jury (G. Br. at 43) suffer from the lack of any demonstration that the documents would have caused confusion. Moreover, all of the cases cited by the Government involve the separation of relevant from prejudicial material, not the simple existence of irrelevant but harmless material to which no one has raised any objection. Insofar as these cases require counsel to "point out or segregate those portions which might properly be offered", Trade Development Bank v. Continental Insurance Co., 469 F.2d 35, 44 (2d Cir. 1972) (G. Br. at 43), defense counsel did just that. The prosecutor failed to object, as he was required to, so counsel had no

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* It is ironic that the Court blamed defense counsel for supposedly infusing the irrelevant pages into the case, for it was the prosecutor who focused at great length on such portions of the exhibits. Defense counsel had no conceivable reason to want large numbers of irrelevant pages submitted to the jury along with the pertinent entries because it would be to defense counsel's advantage to emphasize the degree to which relevant entries stood out and therefore came to Mecom's attention.

obligation to do more than he already did to "sever the good from the bad". Edward Valves, Inc. v. Cameron Works Inc., 286 F.2d 933, 939 (5th Cir.), cert. denied, 368 U.S. 833 (1961) (G. Br. at 43). The provisions of Rule 613 of the Federal Rules of Evidence* were complied with to the letter as well as in spirit and it is nonsense to say as counsel now does that "Mecom was simply not afforded a fair opportunity to explain or deny an inconsistency not previously identified" (G. Br. at 44).

(d) Why did not the Court attempt to correct the situation? If, as the Government and the Court claim, the documents should have been segregated in some way in order to help the jury understand them, why did not the Court simply order it done? The jury had not as yet been exposed to the documents and could not have been prejudiced by any supposed confusion in the way they had been organized or marked.**

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* Newly enacted Rule 613, unlike previous law, does not require that a witness be confronted with a prior inconsistent statement but only that counsel be informed of it, so as to give the witness an opportunity to explain or deny the statement.

** On other occasions during the trial, the Judge was most helpful in suggesting ways to resolve apparent evidentiary difficulties. For example, when faced with a Government offer of a voluminous accountants' workpaper file (G.Exs. 2L-1 through 2L-5) which was made up of loose documents, counsel entered into a colloquy as to how the documents should be marked and which ones should go into evidence. The Court said:

> "We all will rely on both of you to do that, and if there are any problems we will talk about them. But subject to that, why don't we just receive them." (Tr. 451).

In commenting upon Rule 403. to which the Government looks for justification of the trial court's actions (G. Br. at 42-43), Judge Weinstein comments that a trial court's discretion should be exercised carefully, and with a view toward redeeming a defective offer of proof rather than rejecting it.

> "Professor Wechsler reminds us that reasoned explanations are 'the very essence of judicial method;' trial judges should generally explain to counsel why they are excluding relevant evidence so that counsel can, if possible, obviate the objection. (1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 403[02] at 403-14 -- 403-15 (1976)) (emphasis supplied).

In United States v. Wolfson, 437 F.2d 862 (2d Cir. 1970), this Court took a similar position. The trial court was reversed for preventing defense counsel from questioning a key government witness with respect to matters affecting his motive to testify falsely. The court said: "[r]ather than cut off the line of inquiry completely, in a criminal case greater liberality would have been warranted." Id. at 875.

No such liberality was shown here. Not only did the Court fail to take steps to make the Mecom bankruptcy documents more comprehensible to the jury, but it was an offer by counsel to do just that which triggered the exclusion of the documents. Concerned about the degree to which the jury might be confused as a result of the prosecutor's lengthy examination regarding irrelevant portions of the documents, defense counsel offered to prepare subexhibits containing the relevant

portions (App. 1391).* The Court's response was to interrupt counsel's offer with a curt, "Well, it is something you should have done in advance." (App. 1392). With this statement, the Court launched into its denunciation of counsel's failure to "enlighten" the jury by "focusing" on the "issues". The exhibits were stricken from the record and the jury urged to disregard them (App. 1392).

Since this was the first time anyone had thought it necessary to clarify further which portions of the exhibits were relevant, it would have seemed reasonable for the Court simply to adopt the suggestion that had just been made by counsel to do precisely what the Court itself said should be done. By refusing to allow any clarification by sub-exhibit and insisting on striking the documents which had already been admitted - both actions performed in an angry fashion before the jury - the Court created the ineradicable impression in the jury's mind that Mecom's bankruptcy had nothing to do with this case. As a practical matter, the defense was foreclosed forever from raising that issue, even if the Court had been willing -- which it was not -- to later allow it.

Similarly, counsel was not permitted to correct what the Court felt was an inadequate voir dire examination. After the

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* The Government makes the absurd argument that counsel's offer to prepare subexhibits somehow proves that the relevant portions of the documents were not marked (G. Br. at 38 fn). As noted above, the documents were clearly marked in a manner suitable for use by counsel. The offer to make subexhibits related only to making documents easier to handle for presentation to the Court and jury.

documents were stricken, counsel requested the opportunity to ask Mecom the very questions which the Court had said should have been asked (App. 1399-1400). The Court responded that counsel had had his chance after the documents went into evidence and during voir dire (App. 1400). The Court did not explain how counsel could have known that he should ask questions relating to admissibility after the documents had already been admitted into evidence. In any event, if there was a deficiency in the questioning relating to the documents, what possible harm could there have been in allowing counsel to correct that deficiency by asking questions which the Court had for the first time indicated were appropriate?

C. The Admission of Three Documents Could Not Overcome the Need for Cross-Examination or the Impact on the Jury Created by the Court's Actions.

The Government contends that the admission into evidence, after Mecom had left the stand, of three of the ten bankruptcy documents cured whatever problems might have been created by their earlier exclusion, and that any claim of prejudice is "fanciful" (G. Br. at 48-49). In fact, the combination of events surrounding the exclusion of the documents was so devastating to the defendants that the later introduction of these few exhibits was utterly meaningless. Moreover, the relevance of two of the documents could not be understood unless placed in the context of the others and the significance of the third was hope-

lessly buried as a result of the circumstances of its admission into evidence and the inability to cross-examine with respect to it.

1. Admission of the three documents did not substitute for the lack of the remaining seven.

The chief value of the Mecom bankruptcy documents was to demonstrate that during the period from early December 1970 through mid-February 1971, John Mecom took the position in his bankruptcy proceedings that the KRC Arctic contract was a valid and binding obligation. Two of the three documents tardily admitted into evidence were from the period after February 1971, when Mecom had begun to change his position (D.Exs. AA, CC) (App. 1015, 1075-76). Consequently these documents were of little value to appellants out of the context of the other bankruptcy documents and without benefit of the cross-examination of Mecom regarding them.*

The third document, Exhibit W, would be a highly significant document, when taken together with the others to show the entire course of inconsistent conduct by Mecom. But without the other documents showing that the KRC Arctic contract had been deliberately treated as a valid obligation, this single exhibit, put in evidence without a witness on the last day of the trial, could easily be dismissed. Moreover, the prosecutor had effectively neutralized any conceivable impact

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* The Government's assertion that this lack could have been filled by cross-examining attorneys Neal Marriott and Charles Carwile (G. Br. at 48-49) is specious. Neither man had anything to do with the bankruptcy proceedings during the crucial early months when Mecom was affirming the KRC contract (Tr. 1059, 4113-14).

by creating during redirect examination the impression that Mecom had nothing to do with the documents - an impression which the Court in effect endorsed by its ruling and the manner in which the ruling was delivered.

2. Cross-Examination of Mecom Became Absolutely Necessary to the Defense After the Prosecutor's Re-Direct Questioning.

Had the bankruptcy documents gone relatively unchallenged after they were received in evidence, as the prosecutor's original reaction to them indicated they might (App. 1367), there would have been need for only limited cross-examination of Mecom with respect to them. Consequently, defense counsel originally did not plan to question Mecom "at great length" -- unless he had to.*

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* It is utterly absurd to speculate, as the Government does, that counsel had no intention of cross-examining Mecom in this area at all (G. Br. at 45). Counsel began to do so after the exhibits were received, beginning with questions about the attorneys who prepared the documents (App. 1370-71). Faced with the annoyed prodding of the trial judge, counsel decided that the value of Mecom's testimony could not overcome the damage done by the jury's hearing comments from the bench like: "It [Mecom's bankruptcy] has at most a limited interest to us . . . I think Mr. Armstrong is about to accelerate the rate of this cross-examination . . . We are not going to explore the bankruptcy at any length." (App. 1371-72). Consequently, counsel desisted. The Government makes the equally absurd argument that counsel's later applications to re-admit the documents were somehow inconsistent with a desire to cross-examine (G. Br. at 47-48). While Mecom was still available, counsel wanted the documents re-admitted in order to explore the bankruptcy inconsistencies "through the witness" (App. 1403). Merely putting the documents back in evidence would have availed little without meeting the prosecutor's re-direct examination through further cross - but it was a necessary first step. Later applications were necessarily tailored to what counsel thought the judge might give and the failure to ask for particular relief indicated nothing.

The prosecutor's extended re-direct examination made it imperative that Mecom be questioned further. Skillfully avoiding the marked portions of the documents, which were at issue, and concentrating instead upon the irrelevant pages, the prosecutor created an impression in the minds of the jurors of endless reams of unimportant legalistic papers with which Mecom had no connection whatever. (All Mecom said was he did not prepare the documents -- the impression created was much broader.)

Then the judge angrily struck from evidence what he characterized, before the jury, as "a three-inch sheaf of bankruptcy papers," and ordered the jury to disregard them. According to the Court, the "only enlightenment" that the jury got about the documents was "supplied by the Government . . . showing the nature of the attention or inattention this witness paid to these matters at that time." (App. 1392).

In this posture, the significance of the documents was completely destroyed. The jury could only think of them as the prosecutor was later to instruct - "... they were prepared by somebody else, he [Mecom] signed them, period. You may infer that maybe the lawyers got some help from Mecom's accountants ..." (Tr. 4469-70). What else was the jury to think when the Court instructed them to disregard the documents and told them that the prosecutor had "enlightened" them by showing how much attention Mecom paid to "these matters at that time" (App. 1392). What possible impact could a lone document from that same "three-inch sheaf" have when later presented without any explanation at the end of the case? What reason

would a juror have for giving such a document any significance, when the Court long ago made it clear that he considered such documents as meaningless and to be disregarded? What did the face of the document matter if, as the prosecutor said in his summation, Mecom's lawyers and accountants were the only ones who had anything to do with it? And what reason was there to doubt the prosecutor's assertion that Mecom was not involved if defense counsel was obliged, by the limitations of the Court, to stand silent in response to it?

It would have been virtually impossible, once Mecom left the stand, to reverse the impression created by the Court and prosecutor in the minds of the jury. As Weinstein and Berger point out in an analogous context (explanation by a witness of a prior inconsistent statement), delay in correcting testimony can cause disbelief in a jury. 3 J. Weinstein & M. Berger, Weinstein's Evidence §613[02] at 613-10 - 613-11 (1976). The converse of this principle is applicable here -- the witness basically was given only the opportunity to explain or deny, and the impact of the evidence when finally admitted was totally dissipated, Mecom being long since gone.

If defense counsel was to have any chance to counteract the impressions created by the prosecutor and the Court, it could only have been through questioning Mecom. The prosecutor's re-direct examination had opened up a great number of areas with respect to which questioning was imperative (some of these are outlined in the page-long footnote at page 31

of appellant King's main brief*). The denial of the right to undertake this cross-examination was error.

The Court's statement that counsel had enough chance to question Mecom during the original cross-examination and the voir dire is totally unrealistic. The documents had not been stricken when either questioning took place and the Government had not even raised any objection during cross-examination.

Defense counsel limited his questioning during voir dire because he believed that it was improper to use a voir dire examination for substantive questioning. Apparently sharing that view, the trial court had applied it directly to the area now at issue - the Court had refused to allow the prosecutor to inquire about the Mecom bankruptcy on voir dire but told him to do so on re-direct instead (App. 1369-70). If the prosecutor could not ask such questions during voir dire, defense counsel was obliged to conclude that the same rule applied to him and that the time for him to meet the points which the prosecutor had brought out on re-direct would be during the re-cross examination that would follow. When he tried, the Court prevented him.

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* The Government does not even attempt to attack the pertinence of these questions and merely speculates that counsel would not have thought of them at trial. The Government also pretends that "most" of these areas of cross-examination were, or could have been, explored through the bankruptcy documents themselves, Marriott and Carwile. The prosecutor cannot give a single example to support this statement. It is clear that the proposed questions all arose out of the re-direct examination and could not be answered by reference to the three documents later received in evidence. As stated above, neither Marriott nor Carwile had anything to do with the bankruptcy during the important period. Moreover, as Mecom's attorneys, the substance of Marriott's and Carwile's conversations with Mecom were privileged.

The real question with respect to the trial court's limitation of defense counsel's examination of Mecom is what made such a limitation necessary? Suppose counsel was in error in deciding which questions were appropriate for voir dire and which for re-cross examination. What possible reason was there for the Court to punish counsel for that technical error by denying him the right to correct his mistake - at a time when a correction would not have affected the jury in the least?

The conclusion is inescapable: defense counsel was improperly prevented from presenting to the jury a vital issue which went to the very heart of the defense, namely, Mecom's deliberate decision to affirm the validity of the KRC contract to the court during his bankruptcy reorganization, at a time when he had the strongest of motives to disaffirm that very contract.

POINT II

THE GOVERNMENT'S PRE-INDICTMENT DELAY DEPRIVED KING OF A FAIR TRIAL

There can be no real dispute that a substantial pre-indictment delay occurred in this case. More than 5 years elapsed from the time of the Mecom and COG sales to the return of the indictment. The Government seeks to escape responsibility for the consequences of this delay by contending that its failure to act more promptly was neither "purposeful" nor "prejudicial" (G. Br. at 49). Appellant King urges that the Government consciously opted for delay and, as a result, was required to establish that its delay did not impair the defense. See United States v. Barket, 530 F.2d 189, 196 (8th Cir. 1976).

The brief chronology of undisputed events set forth in the footnote accompanying this text establishes that:

(1) By early 1971, the Government possessed all the essential facts which it later claimed supported its charge of fraud in connection with the Arctic sales to Mecom and COG;

(2) Because of the essential weakness of the Arctic charge as an independent basis for prosecution, the Government deliberately decided not to prosecute those charges, and instead planned to use them as "background" or collateral evidence in other criminal charges against King which were later placed before a Denver grand jury; and

(3) The Arctic charges were not pursued any further for more than two years, and no indictment was returned until 1975, by which time the Denver investigations had collapsed.

In the interim, vital evidence and witnesses had been lost.*

A. The Government's Delay Was Purposeful and Tactically Motivated.

The Government proffers two principal rationalizations for its delay: (i) the significance of the evidence obtained by the Government in 1970 and 1971 with respect to the alleged non-arm's length nature of the Mecom and COG sales "was not, and could not be, immediately understood" by the Government (G. Br. at 51) and supposedly did not become understood until mid-1973; and (ii) the SEC's Denver office was so busy investigating other alleged "frauds" perpetrated by King (none of which resulted in an indictment)

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* December 1969: KRC, acting for FOF, agrees to sell Arctic interests to Mecom and COG for FOF revaluation purposes.

February 10, 1970: King's memorandum of conversation with Mecom in which Mecom asks for financial help in regard to his Arctic purchase.

January - April 1970: Newspaper criticism of FOF's Arctic revaluation.

May 20, 1970: Wall Street Journal article reflecting interview with Trueblood (of COG), indicating COG purchase of Arctic interest was not bona fide.

May - June 1970: COG suspends trading pending a clarifying letter to its stockholders regarding its Arctic purchase. COG's draft letter reviewed (and modified) by SEC staff in context of newspaper criticisms.

June 2, 1970: Sporkin of SEC questions Boucher regarding Arctic sales.

June 15, 1970: Attack on Arctic sales continued by Wall Street Journal.

[Footnote continued on following page]

[Footnote cont'd from preceeding page]

July 21, 1970: Cowett of FOF testifies before New York grand jury (on other matter) and is questioned about Arctic revaluation.

August - November 1970: KRC financial troubles lead to King resignation. Boucher takes over as Chief Executive Officer of KRC. Civil litigation started against KRC regarding Arctic transactions. King deposed three times by SEC.

December 1970: Mecom files for reorganization in bankruptcy. His initial filings show the Arctic contract as his single largest unsecured obligation, but treat the contract as fully binding and make no attempt to rescind or disavow.

Early 1971: SEC sues King, Boucher and KRC on other matters involving IOS. SEC-approved Special Counsel is appointed by KRC for blanket investigation which gives SEC complete access to all KRC files.

February 1971: Mecom modifies his bankruptcy position and, while acknowledging the validity of the Arctic contract, claims KRC had breached it.

February 1971: Von Stein of SEC reviews SEC's clipping file on Arctic controversy.

February 17, 1971: Frederickson of KRC explicitly charges (to Denver SEC office) that Mecom and COG sales were not bona fide. Memorandum of the interview is sent to Sporkin.

March 10, 1971: Frederickson returns to Denver SEC with documentation, including a version of Government Exhibit 1, the alleged buy-back agreement between Mecom and KRC. (The text of this version differed somewhat from Government Exhibit 1.) Memorandum of the interview is sent to Sporkin. SEC evidently concludes that case against King based on Mecom sale is inconclusive, and decides to pursue other avenues instead.

March 16, 1971: Denver SEC staff interviews Harry Cooper, then KRC's president, regarding COG's Arctic purchase. A memorandum of this interview is sent to Sporkin. On the same day King is again deposed by the Denver SEC.

[Footnote continued on following page]

[Footnote cont'd from preceeding page]

April 1971: Publication of a book entitled "Do You Sincerely Want to Be Rich", containing detailed charges that Arctic revaluations were not bona fide and that Cowett was involved.

June - August 1971: King files in personal bankruptcy and testifies on various KRC matters, including the Arctic, Raff and Lakeshore.

End of 1971: Lowry testified at trial that he had kept in his safe a copy of a Mecom buy-back agreement signed by someone (date not fixed), but had disposed of it by the end of 1971 because it was no longer applicable.

February 1972: Lowry testifies (to IRS) that buy-back agreement between King and Mecom had been discussed but never actually executed by anyone.

April 27, 1973: SEC completes investigation of two criminal charges against King and refers them to Denver U.S. Attorney for prosecution. Arctic revaluation not raised by SEC.

June 24, 1973: SEC finally issues formal order of investigation regarding KRC sales to FOF and valuation of FOF's oil and gas prospects, naming King, Boucher and Cowett as targets.

July 1973: Von Stein assigned to instant case by SEC on part-time basis.

August 1973: Boucher resigns as officer and director of KRC. King and Boucher no longer have access to KRC files.

April 1974: Cowett testifies before Denver grand jury on IOS matters.

May 1974: King called before Denver grand jury and informed that investigation includes the Mecom sale. King refuses to testify.

August 1974: Cowett dies of a heart attack.

September 1974: Denver grand jury has decided not to indict King on any of the charges. SEC refers the instant case to the U.S. Attorney in New York.

November 1974: New York grand jury empaneled in instant case.

January 20, 1975: Indictment issued. Substance of charges already more than five years old.

that it would have been a poor allocation of the Government's "scanty" resources to pursue an investigation into the Arctic revaluation earlier than mid-1973 (G. Br. at 51 and 53n).* Neither excuse is convincing.

In effect, the Government now argues that while it knew about the "fraud" in 1970 and 1971, it failed to understand it. The flaw in this argument is that the Government really learned nothing after 1971 that was essentially different from what by 1971 it already knew or had readily available to it on the basis of published information. This can be seen from the following undisputed facts, all but one of which is taken directly from the sworn statements below of SEC investigator Thomson Von Stein, which suggest that the prosecutors' protestations of ignorance are not supportable:

> (1) In 1970 and early 1971, the Arctic sales and revaluation were the subject of an "intense public and private scrutiny" (App. 606);
>
> (2) The Arctic transactions were questioned in the press "since early 1970". These press criticisms were collected by the SEC, which maintained a separate "clipping file" on IOS (App. 606);
>
> (3) As early as April 20, 1970, Barron's suggested that the Arctic transactions had been undertaken at the last minute in order to inflate FOF's year-end 1969 net asset values (App. 606);

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* The Government seeks judicial approval for this latter rationale by misciting the dissenting opinion in United States v. Griesa, 481 F.2d 276, 286 (2d Cir. 1973), a severance case in which the dissent objected to the necessity for two separate trials in two different districts in part because of the burdens that separate trials would place on the SEC staff. In any event, while Government law enforcement agencies undoubtedly have certain budgetary constraints, it does not appear to have spared any expense in investigating appellants and trying this case.

(4) In May 1970, reports in the Wall Street Journal questioned whether IOS had inflated the value of its Arctic holdings and quoted King as having contradicted an earlier press report that COG (presumably per Trueblood) had stated that it could turn back its Arctic interest to KRC at will (App. 607);

(5) The SEC staff actively participated in the preparation of COG's June 6, 1970 letter to its stockholders (Tr. 1808, 3346), which expressly stated that it had been written by Trueblood "to provide current information concerning recent transactions by . . . [COG], to correct certain recent erroneous reports which appeared in the press, and to clarify . . . [COG's] present position in several matters." (App. 839);

(6) Numerous other press articles in 1970 and 1971 referred to the controversy engendered by the Arctic revaluation (App. 607);

(7) In April 1971, just one month after Arman Frederickson had displayed to the SEC a version of Government Exhibit 1, a book entitled "Do You Sincerely Want to be Rich" was published which contained a lengthy chapter relating to King. In Von Stein's opinion, this chapter, which he admittedly read as early as the spring of 1971,* "[i]n many respects ... outlined the fraud charged in this case" (App. 608);**

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* The book purported to detail the inside story of IOS, including King's relationship with it and his attempts to effect a takeover in May 1970. Sensationally written, it was heavily laden with sarcasm, contained numerous inaccuracies and mischaracterizations and, interestingly enough, suggested that Cowett and Cornfeld were the moving forces behind the allegedly fraudulent Arctic revaluation.

** The Government included a copy of the entire chapter in its in camera submissions to Judge Frankel made prior to trial in opposition to appellants' bankruptcy motions (App. 611-34). The avowed purpose of the submission of this inflammatory material was to demonstrate that none of the Government's evidence had been tainted by the bankruptcy because it knew all about the alleged fraud long before it came into contact with the bankruptcy materials.

(8) The cumulative impact of this material, even without Frederickson's information, was described by Von Stein as follows:

> "The Arctic transaction of December 1969/ January 1970 had achieved great notoriety in the press in 1970 and in the book, "Do You Sincerely Want to be Rich" ... where it was ridiculed and the revaluation called mathematical gymnastics...." (App. 594); and

(9) This notoriety made the Arctic transaction a "natural focus" for investigation (App. 595).

It is inconceivable that both Sporkin (who admits to having had an intense interest in King and IOS) (App. 242-43) and the Denver SEC (which was then actively investigating King) (App. 243) could have been unaware of this "notoriety" and of the significance of Frederickson's specific charges and evidence. Nor is the Government correct when it asserts (G. Br. at 50n.) that there is nothing which shows that the Wall Street Journal's report of COG president Harry Trueblood's comment had ever been read by anyone at the SEC. Not only does it appear from Von Stein's affidavit that this article was contained in the SEC's clipping file, but also as indicated above, the SEC's Washington staff, including Sporkin, actively participated in the drafting of the COG letter released to its stockholders (Tr. 1808, 3346; App. 606-07). Are we to believe that the SEC staff would have participated in the preparation of a significant release without being aware of or inquiring as to the nature of the articles that had necessitated the release, and without reading those articles in order to better understand the context in which they were working?

The Government further seeks to minimize the significance of its early evidence by arguing that "Frederickson's information did not even begin to give shape to the mosaic of proof, which would later be developed at trial" (G. Br. at 52). This is another classic straw man. King does not suggest that the Government was required to indict him upon the receipt of Frederickson's material. Both the Government and potential defendants share an interest in careful investigations. Subsequent events amply demonstrate, however, that with reasonable promptness Frederickson's material could have been readily verified or rebutted, and a decision as to prosecution could easily have been made by late 1971. Moreover, each of the facts which the Government specifies in its brief as having been unknown to the SEC in 1971 (G. Br. at 52) actually involved a collateral matter -- none conclusive one way or another -- which was either already known to the SEC in 1971 or was readily available to it at that time. This is not a case where the SEC stumbled upon a secret after 1971. Nothing here was a secret, and all the information was quickly ascertained once the SEC decided -- more than three years after the event -- to bring these stale charges center stage and pursue them further.

For example, the Government states that in 1971 the SEC was wholly ignorant of the "fraudulent Raff transaction" (G. Br. at 52). It is clear that the transaction (i) had nothing to do with the Arctic revaluation, (ii) had occurred one year before the Mecom and COG sales, and (iii) had an immaterial effect upon FOF. Moreover, the Government's authoritative statement

that the transaction was unknown to the SEC in 1971, is unwarranted. The transaction is unmistakenly described (without using Raff's name) at page 395 (App. 623) of "Do You Sincerely Want to be Rich" in the very chapter which Von Stein admits he read in the spring of 1971.*

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* The Government's other specifications are equally unconvincing and inconclusive:

(1) KRC's gross profit margins in its sales to FOF: This information is a classic instance of misuse of collateral business data to confuse a jury. Not only was it contained in KRC's books and records, all of which were available in 1970 and 1971, but also KRC's mark-ups, including those on the Arctic, were criticized in "Do You Sincerely Want to be Rich."

(2) King's $1 million loan to Lakeshore: The testimony is undisputed that Lakeshore's purchase of an interest in the Arctic was not relied upon by FOF or its auditors for purposes of the revaluation, and the sale was not even presented to the jury as having involved a side deal which might have made the Arctic sales non-arm's length. The loan was useful, however, for confusing the jury.

(3) Harry Cooper's testimony: This could hardly have been material, given the fact that Cooper continues to this day to deny the existence of a side deal with respect to Bristol Bay, and did so under oath at trial. Cooper's denial never was believed by the Government and never forestalled an investigation. Indeed, the Government called Cooper as its witness and then tried to impeach him on this precise issue.

(4) Representation letters to Arthur Andersen: The principal representation letters involved in this case were executed in January and May of 1970, and were readily available, especially since (as Von Stein pointed out below) Arthur Andersen's role in the revaluation had been commented upon in 1970 newspaper reports and in "Do You Sincerely Want to be Rich" (App. 597). As a result of such comments, the accountants' work papers were subpoenaed by the SEC early in its investigation (App. 596). The June 1971 representation letter, of which the Government tries to make so much in its brief (G. Br. at 52), essentially reiterated the representations previously made in 1970

[Footnote continued on following page]

The Government's contention that it lacked adequate resources to pursue these matters is similarly without merit.* Taking into account that by early 1971 the Government had ascertained all the essential facts as to the claimed overvaluation, it is clear that the delay was the product of a deliberate tactical decision. In part, the delay reflected the essential weakness of the overvaluation claim as an independent charge. By sitting back with the Arctic case, the Government could confront King with these allegations later during the course of other contemplated prosecutions, where weak evidence of secret Arctic side deals could be offered as similar acts

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[Footnote cont'd from preceding page]

and related to events in Mecom's bankruptcy which were known to the auditors (Tr. 2105-07) and referred to in KRC's 1970 Annual Report (G.Ex. 2H).

(5) Swearingen testimony: The Government provides only a distilled description of the meeting between King and Swearingen, Standard Oil's president. As discussed above, the meeting related to a dispute between KRC and Standard Oil over drilling rights in the Gulf of Suez, as well as Cowett's desire to acquire direct oil production for FOF through the purchase of Midwest Oil Company from Standard Oil for approximately $250 million in cash. With respect to the latter matter, Cowett had directed KRC, which was acting as FOF's agent in the negotiations, to condition the offer for Midwest on Standard Oil's agreement to purchase 25% of FOF's Arctic interest at $15 per acre, payable $40 million in cash and $40 million in work obligations. These matters were fully and openly documented by records in the KRC and FOF files, all of which could have been readily obtained in 1971.

* The Government's argument (G. Br. at 53n.) that it would have been a poor allocation of its resources to investigate the Arctic in 1971 is inherently inconsistent with the prosecutors' repeated attempts to characterize this case as a "massive fraud".

which could provide a background to the main charges (App. 263-64). When the Denver investigations floundered, the Government turned the case against King upside down, centered its charges on the Arctic and then attempted to introduce, at this trial, matters investigated by the Denver authorities as similar acts to the Arctic sales.

The manner in which the Arctic investigation was eventually conducted belies the Government's protestations of impotency in building that case. As Von Stein acknowledged, the substance of the Government's case was outlined in the media and "documented" by Frederickson as early as 1971. When the SEC belatedly moved, it was able to rely primarily upon Von Stein, who worked out of Washington (not Denver) and also was involved at the same time in the Vesco investigations (presumably a task at least equally demanding as the one facing the SEC's Denver staff). The criminal reference report on the Arctic was completed by the SEC after only 18 months of essentially part-time investigation The SEC then referred the matter to this District, rather than Denver (where the other King investigations had in the meantime collapsed). Having been unsuccessful in Denver, the Government reached out for a more hospitable forum, far from appellants' homes. Indeed, the Government's choice of this District for the trial of this case confirms that its decisions with respect to the pursuit of King on the Arctic matter have been tactically

motivated from the outset by the weakness of the case.*

Although Judge Frankel indicated that he was troubled by the implications of the Government's early knowledge of the facts underlying its allegations (Tr. 2734), he erroneously accepted at face value the Government's explanations for its delay and denied appellants a hearing at which they could challenge or test those explanations. Given the resulting impairment of appellants' abilities to interpose a defense, and the instances of prejudice specified below, a just balancing of all the circumstances of this case required a dismissal of the indictment.

The Government has not even attempted to distinguish the cases relied upon by appellants in the initial King Brief. None of the cases cited by the Government to justify its delay here involved a situation where a deliberate delay had resulted in prejudice; each is readily distinguishable on other grounds

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* While it appears that the law presently requires precious little contact to support venue in this District, there can be no doubt, as Judge Frankel recognized during trial (Tr. 2620), that in fairness the case should have been tried elsewhere. The Government's forum-shopping had a substantial adverse impact upon appellants. As men who now have limited assets, facing acute crises in their personal lives in Denver, having to retain distant counsel with whom they had no prior connection and who, as a practical matter, had no possible access to the corporate source documents, appellants were at a distinct and unfair disadvantage when required to defend themselves in this District. King's counsel, upon coming into the case, was denied a two-day adjournment to file pre-trial motions and was obliged to do so in three days (App. 472-73). Boucher, whose initial counsel advised the Court at an early stage that he could not represent him at trial because of a conflict, was unable to raise funds to obtain trial counsel until virtually the eve of trial.

as well. In United States v. Schwartz, 535 F.2d 160 (2d Cir. 1976), a principal Government witness did not agree to testify against the defendants for four years; in United States v. Eucker, 532 F.2d 249 (2d Cir.), cert. denied, 45 U.S.L.W. 3249 (Oct. 4, 1976), the defendants did not raise their pre-indictment delay argument until after conviction; in United States v. Finkelstein, 526 F.2d 517 (2d Cir. 1975), cert. denied, 425 U.S. 960 (1976), the court held that a showing of more than generally dimmed recollections must be made before an indictment would be dismissed for pre-indictment delay; in United States v. Ianelli, 461 F.2d 483 (2d Cir.), cert. denied, 409 U.S. 980 (1972), one defendant conceded that the delay had not resulted in any prejudice, while the other defendant merely speculated that he might have been able to find an unnamed and unidentified witness if he had known about the charges earlier; in United States v. Briggs, 457 F.2d 908 (2d Cir.), cert. denied, 409 U.S. 986 (1972), there was only a two-month delay between defendant's participation in a narcotics transaction and his arrest which was occasioned by the Government's efforts to locate other suspects and the court found that no prejudice had resulted from that brief delay; in United States v. DeMasi, 445 F.2d 251 (2d Cir.), cert. denied, 404 U.S. 882 (1971), the federal authorities had only been involved in the investigation for one year prior to indictment; in United States v. Stein, 456 F.2d 844 (2d Cir.), cert. denied, 408 U.S. 922 (1972), the delay was occasioned by the need for a long and complicated investigation which had been promptly

initiated (as compared with the instant case, where the formal investigation was three years late in starting); in United States v. Ferrara, 458 F.2d 868 (2d Cir.), cert. denied, 408 U.S. 931 (1972), the Government's star witness did not agree to cooperate until later on in the investigation; in United States v. Parrot, 425 F.2d 972 (2d Cir.), cert. denied, 400 U.S. 824 (1970), decided before the landmark case of United States v. Marion, 404 U.S. 307 (1971), certain witnesses were unavailable to the defendants before any realistic trial date and no prejudice resulted from the Government's need to undertake a long investigation in a complicated case; United States v. Capaldo, 402 F.2d 821 (2d Cir.), cert. denied, 394 U.S. 989 (1968), a similarly pre-Marion decision, was devoid of any lost witnesses, unwarranted delay or prejudice; and in United States v. Feinberg, 383 F.2d 60 (2d Cir. 1967), cert. denied, 389 U.S. 1044 (1968), also pre-Marion, the court found that no prejudice had been suffered.

B. The Delay Resulted in Substantial Prejudice to the Defense.

As demonstrated above, there can be no question that the Government's three year delay in launching its formal investigation was not, as initially represented to the trial court, due to lack of knowledge. The Government had its strongest evidence -- for whatever it was worth -- in 1971; its failure to proceed promptly with that investigation necessarily involved a conscious and intentional decision. That decision substantially prejudiced appellants.

In possession of such information, the Government had an obligation promptly to investigate Frederickson's charges in order to determine whether or not to proceed. Of course, to have done so at that time would have alerted appellants to the need for assembling evidence to defend themselves. At that time both appellants were financially much more able to prepare their defenses than they were later, and had much greater access to corporate documents which would have aided them. Boucher was then president of KRC, and through him appellants might have been able to conduct general file searches. This opportunity was lost forever once Boucher was no longer with KRC and the documents were almost exclusively in the hands of a trustee in bankruptcy whose interests were opposed to those of appellants.*

By holding off on commencement of an independent criminal investigation, the Government also stood to benefit tactically

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* Defense counsel was required to rely almost entirely upon the documents selected by the Government. Despite the prosecutor's statements to the contrary (G. Br. at 62), KRC's files were, for all practical purposes, unavailable to King. By the time trial approached, KRC's trustee had been so inundated with requests for access to KRC's files and records that his counsel stated to defense counsel that he would only consider requests for copies of specifically identified documents and would contest in the Denver courts any attempts to subpoena KRC's records. Without access to KRC's files, defense counsel could not specify particular documents, and were required to rely upon appellants' recollections of 5 and 6 year old events. For example, at trial the Government tried to buttress its charges of side deals by arguing that prior to the Arctic sales neither Mecom nor COG had been involved with KRC in any transactions. Appellants testified to the contrary, but without access to documents in Denver their credibility could not be corroborated.

from testimony and documentary evidence which would be forthcoming in the many civil lawsuits and SEC proceedings arising from KRC's problems. The various bankruptcy proceedings in which the Government actively participated, also provided fruitful sources of further information for the prosecution. As discussed in appellants' pretrial bankruptcy motions, the KRC trustee conducted an investigation of the very facts of this case, culminating in a report dated October 10, 1973 (App. 189-214) which was apparently received by the Government in the Fall of 1973 (App. 52).*

The Government further benefitted by being able to gather information through the Denver criminal investigations which, while they "focused" on other matters, did not ignore the Arctic. In essence, the Government sought to retain the ability to take "two bites at the apple" in different districts at different times. The Government's bifurcated strategy enabled the SEC to investigate appellants under the guise of looking into one set of transactions while holding back on the charges that ultimately led to the indictment in this case. Thus, the 3500 material turned over at trial revealed that inquiry about the Arctic transaction was made in the Denver grand jury during the examinations of at least two of the Government's witnesses at this trial --

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* The Government was and remains an active participant in King's personal bankruptcy proceedings. As specified in appellants' bankruptcy motions below, Von Stein not only was in contact with the Government representatives involved in the proceedings, but also read certain documents and received testimony from them. The same is true with bankruptcy proceedings.

Roger Davis (App. 53) and Bennett King (App. 53). Since appellants never had access to the full record of the Denver grand jury investigation, and were erroneously denied a hearing on their delay motion, they cannot state whether other witnesses were similarly questioned.

The Government's attempts to minimize appellants' detailed specifications of the prejudice suffered as a result of the Government's delay (App. 51-83, 272-85) require further comment:

(1) The Loss of Government Exhibit 1: Appellants maintained at trial that there was never an agreement between King and Mecom entered into as part of, and at the time of, the sale itself -- as charged by the prosecution. The Government's delay in taking the most elementary investigative steps to follow up on Frederickson's allegations deprived appellants of the opportunity to prove their contentions and to challenge the only bit of documentary evidence in this case, Government Exhibit 1, which -- albeit in fragmentary fashion -- suggested that there might have been such an agreement at some unspecified time.

Lowry was the only witness who testified at trial that an agreement containing the substance of Government Exhibit 1 had been signed by King, who denied signing such a document (App. 1331). Lowry had previously testified to the IRS in February 1972, only weeks after he said he had disposed of the document, that a buy-back agreement with Mecom had been "discussed" and "talked about," but had never been executed (App. 1251-55; G. Ex. 3507B).

Lowry had reviewed the particular portion of his IRS transcript which mentioned the aborted Mecom agreement shortly after he gave it (App. 1255), and at trial he could offer no explanation for his prior testimony (App. 1255, 1257-58). Far from confusing the Arctic with another deal in his 1972 testimony, as the Government now tries to suggest (G. Br. at 60-61), Lowry conceded at trial on cross-examination the glaring inconsistency between his 1972 testimony and his trial testimony (App. 1255-58).*

The Government argues that the loss of the supposed executed document and the inability to establish its date was somehow beneficial to King. Apparently conceding that Government Exhibit 1 was only a preliminary draft of some kind (as they must, given the fact that Lowry's name is misspelled therein), the prosecutors now state categorically to the Court, without any proof whatever in the record, that a carbon copy of the executed Mecom buy-back agreement was found in Lowry's file. From this they argue that prompt prosecution would have disclosed the supposed original. In making this contention, the prosecutors

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* Lowry's reference in his 1972 IRS testimony to a buy-back agreement between King and Mecom relating to Colorado Corporation oil and gas leases in West Texas did not, as the Government contends (G. Br. at 60-61), involve some other deal, but rather the very arrangements involved in this case. Mecom apparently hoped to generate sufficient cash profits to pay for his Arctic interests through independent business deals with KRC or the Colorado Corporation which were under discussion in December 1969 and involved various Mecom oil and gas leases in Texas and Louisiana, as well as the use of one of his drilling rigs for a deep well test by a subsidiary of the Colorado Corporation in West Texas. Lowry clearly had these deals in mind when he testified to the IRS and the reference confirms rather than undercuts the accuracy of his memory at that time.

have unwittingly disclosed the misplaced extent of their zeal, for they have failed to advise this Court (i) that neither Lowry nor any KRC secretary was able to authenticate the genuineness of the supposed carbon copy document and (ii) that while the unauthenticated carbon refers to the Chicago law firm in which Lowry was a named senior partner in 1969-1970, in setting forth what purports to be the complete firm name it erroneously omits Lowry. Surely this unadmitted and unauthenticated contrivance was not and could not have been, as the Government now states without reservations, a genuine carbon copy of any executed agreement prepared by Lowry. Certainly, he could not have forgotten that the name of his law firm included his own name.

Moreover, the precise terms and date of any executed buy-back agreement were of vital importance to the defense. In the absence of the document itself, appellants were left with the reconstructed memories of witnesses who gave conflicting testimony and experienced lapses of memory.* The terms of the agreement were important because of the fine line which existed between (i) the Government's version (an outright commitment by King to buy back Mecom's interest or to provide sufficient work in order to give Mecom the money to meet his obligations, which would have impacted the arm's length nature of the deal) and (ii) King's version (that he had asked Lowry in his February 10, 1970 memorandum to draft a letter to Mecom which reflected

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* Lowry's confusion is entirely understandable, since at 71 years of age, he has recently been in failing health, and during the last year underwent a serious cancer operation (App. 856).

King's willingness to help Mecom out with his banks by helping him sell his Arctic interest if the need arose, and that he had an understanding with Mecom pertaining to other unrelated business dealings which would have provided Mecom with profits from which he could, if he chose, meet his Arctic payments).* Judge Frankel correctly charged the jury that if King's version were correct, King could not be convicted on the basis of the Mecom transaction. The final document which Lowry says he kept in his Chicago safe and later destroyed -- whether executed or not -- might well have confirmed King's credibility on the most crucial point in this case.

The date of the alleged buy-back agreement was also critical. If any buy-back agreement or other side deal had not been entered into until after the Mecom contract had been executed (for example, if they had been prompted by the February 10, 1970 Mecom-King telephone conversation), the Government's entire theory of the Mecom transaction would have been totally discredited. The contemporaneous memorandum reflecting that telephone conversation (App. 1117)* disclosed that King had expressed a willingness to

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* While the Government is correct when it states that King asserted that his February 10, 1970 conversation with Mecom involved no guarantee or commitments, Lowry's initial draft prepared in response to King's memorandum could certainly have contained such language as a result of follow-up conversations between Lowry and Marriott.

provide Mecom with some assurances, which Mecom could present to his bankers, to the effect that King would be willing to help Mecom sell his Arctic interest, or buy it himself if it became necessary to do so in order to protect Mecom. Judge Frankel charged the jury that if, pursuant to this conversation, an agreement had been subsequently drafted by Lowry, either in draft or in final form, such agreement would not have had any effect upon the charges in this case. It is not unreasonable to think that, if Lowry had prepared such a document and placed it in his safe, he or his secretary might have made some sort of notation as to when it had been put there or when it had been prepared.* Thus, if the Government had investigated promptly, the defense could have ascertained the actual date when any draft -- or executed version, if one existed -- of the alleged buy-back agreement had been prepared.

(2) Edward M. Cowett: The delay in prosecution meant that Cowett -- who died in August 1974 -- was unavailable to the defense. Cowett played the key role for FOF and IOS in the

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* Lowry testified that he might have sent the proposed agreement to Marriott as late as February 1970 (App. 1261). Marriott testified that he was able to remember that he had received the side deal draft late in January, because he recalls that he had decided to delay confirming to FOF's auditors the absence of any side deals until he had received the very agreement which constituted the side deal (App. 1232-33). This explanation is ludicrous. If there had been a side deal, the more likely sequence would have been for Marriott to have confirmed the written agreement before there was any draft side agreement. This sequence would have placed Marriott's confirmation on January 27, 1970 (Tr. 1031) and his receipt of the side deal draft subsequent to that date.

transactions involved in this case. In an operational sense, he ran both IOS and the natural resource property ventures of FOF (Tr. 268-70). In these roles, he was the person who was responsible for deciding which properties FOF should buy from KRC (Tr. 103; 302-06) and he reported "often" to the FOF board of directors on developments in the natural resource fund account (Tr. 110), including those relating to the Canadian Arctic. In mid-1969, the FOF board authorized Cowett to obtain outside help in evaluating the Arctic properties in order to see whether a revaluation was required (Tr. 116-18). He also played an extremely active role in deciding how much of FOF's interest should be sold, the price at which it should be sold, and the kinds of purchasers to whom it should be offered. In addition, he had extensive discussions about the Arctic transaction with Arthur Andersen (Tr. 256-57) and represented to the accountants, as did King and Boucher, that the Mecom and COG sales were arm's length transactions. After the sales, Cowett provided the FOF board with a detailed explanation of the Arctic transaction (Tr. 210-11).

Of course, years after the events, the defense had no effective way of ascertaining in detail the deceased's Cowett's knowledge of and involvement with the facts of this case. Accordingly, when pressed by the trial court as to further specifics as to what Cowett might have said under oath at trial, defense counsel, who never had any opportunity to meet with or speak to Cowett, acknowledged candidly that he could not advise the Court as to the contents of the testimony that the

deceased would have furnished. Contrary to the Government's intimation (G. Br. at 56), this acknowledgement was not an expression of counsel's views as to the effect of Cowett's unavailability or of an inability to cite specific instances where Cowett's testimony was needed. (See, e.g., App. 54-83; 282-85). The fact is, however, that the Government questioned Cowett under oath on at least two occasions after the Arctic transactions, and it was the prosecutor's burden, not appellants', to show that Cowett's absence had not prejudiced the defense.

Perhaps the most astounding aspect of the Government's claim that Cowett's testimony would have helped the Government, is the fact that in June 1973, when the SEC finally got around to issuing a formal order of investigation in this case, Cowett was one of three persons named as a principal target of that investigation (App. 105-06). More than another year would pass before the SEC would decide to refer the Arctic transactions to the Department of Justice for criminal proceedings. That decision was made just one month after Cowett died of a heart attack. His death appears to have prompted a reevaluation by the Government of his role. Instead of arguing to the jury that the deceased had also been involved as a participant in the alleged fraud, the Government changed directions and urged that Cowett, far from being a guilty party, had been duped all along. This convenient change of theory ultimately resulted

in the Government vouching for the unsworn hearsay statement* of a man who, when alive, had clearly been a prime target of various SEC investigations.

Throughout the trial the Government argued that FOF and Cowett had been continuously misled by appellants as to the terms of the transactions between FOF and KRC, the nature of KRC's mark-ups and the value of the property sold to FOF. Appellants submit that it is much more probable that they would have been able to show, and that Cowett would have admitted under oath, that he had been well aware of and encouraged KRC to deal with FOF in the manner that it did. Indeed, this was precisely the conclusion reached by the KRC trustee in his report to the bankruptcy court in Denver.**

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* The Government appears to rely upon a self-serving unsworn statement made by Cowett to Lowry in November 1970, when Cowett was no longer at FOF or IOS and was attempting to avoid being sued by his unfriendly successors. The maneuvering within FOF to place the blame for the fund's problems on old management (i.e., on Cowett and Cornfeld) can be seen by the following excerpt from Conwill's July 7, 1970 letter to Boucher (G.Ex. 1-S):

> "May I state unequivocally that this notification and the change in procedure in no way implies any criticism of your organization [KRC] or anyone connected with it. Such criticism as may be implicit in the Board's action is solely attributable to prior Fund of Funds management which may not have informed the Board sufficiently of the extent of commitments made and the implications as to possible necessary future payments to protect and preserve interests once acquired."

** Cowett, a distinguished attorney who had worked closely with King, would have been a knowledgeable and articulate witness. In disingenuous fashion, the prosecutors suggest that, lacking Cowett, appellants should have called Cornfeld (who was under Government subpoena). As the prosecutors well know, Cornfeld is hostile to King and has a clear present self-interest in claiming that he knew nothing about KRC's sales to FOF. Moreover, when defense counsel contacted Cornfeld prior to trial, they found him to be virtually incoherent, and so informed the prosecutors.

The specific areas where the Government charged that appellants had deceived Cowett and FOF, and which Cowett could have rebutted as false, included the following:

(a) The alleged motive: As discussed in Point III of Boucher's initial brief, the Government stressed throughout the trial that appellants had effected non-arm's length sales in order to attract more business from FOF. The Government claims that its ability to establish this motive was "vital" (G. Br. at 97) to its case. King testified that far from assuring KRC of future FOF business, the Arctic revaluation had the opposite effect. As a result of the revaluation, King explained, FOF's natural resource property interests represented a much more substantial percentage of FOF's total assets and virtually precluded FOF from making substantial additional purchases of new exploratory projects and properties until the market-linked portion of its investment portfolio had significantly increased in value so as to reduce the percentage attributable to non-liquid assets. The extent of further business from the IOS complex was primarily dependent upon IOS's ability to market the securities of new mutual funds or other corporate entities which would be authorized to make natural resource property investments. An explanation from Cowett confirming these circumstances, as well as the financial and operating difficulties facing IOS and FOF at that time,

would have undercut the Government's argument on motive and supported appellants' credibility.

(b) The COG transaction: Cowett appears to have been in a position to provide relevant testimony which would have had direct impact on the question of whether secret inducements had been given by King and Boucher to COG. Cowett was aware of COG (FOF had invested in COG stock prior to its relationship with KRC (FOF Quarterly Report, March 31, 1968, p. 3) (D.Ex. A, p. 9), and had discussed with King the possibility that IOS's real estate fund might want to invest in COG's Hawaiian properties. As the person responsible for approving all purchases by FOF of properties from KRC (Tr. 302-06), Cowett would have had to have been aware of and approved FOF's purchase of an interest in Bristol Bay from KRC. The Government argued at trial that KRC's purchase of an interest in Bristol Bay from COG was not only an inducement for COG's purchase of an interest in the Arctic, but also that the defendants somehow concealed from FOF the fact that KRC thereafter sold part of that very interest in Bristol Bay to FOF. Cowett's testimony could have refuted the Government's arguments on Bristol Bay. Cowett could also have confirmed King's testimony that no understanding had ever been reached for COG to receive from FOF (through KRC) sufficient proceeds to meet its obligations under

the Arctic contract.*

(c) The Mecom transaction: King asserted below (App. 282-84) that Cowett was aware of numerous prior dealings between Mecom and King and that Cowett and King had discussed a number of them. King also asserted that Cowett may have known about discussions between Mecom and King concerning their proposed partnership, and that the source of the funds used by Mecom for his downpayment on the Arctic was an advance made by one of the King companies on an unrelated business transaction. Cowett's testimony about his own relationship with Mecom (whom he knew personally) could well have revealed that the two men spoke about the Arctic and, at the very least, would have bolstered appellants' contentions that these various other dealings with Mecom were unrelated to the Arctic. In the course of the hectic activities of the time, appellants could easily have mentioned such other arrangements to Cowett, and the extent of his knowledge would have confirmed appellants' innocent intent. If they had told Cowett, for instance, of understandings about giving Mecom drilling business, the jury would have had to weigh such open disclosure carefully in deciding whether such

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* Such an understanding with COG would necessarily have required Cowett's approval. The Government furnished no proof of any such approval. Before the jury, however, it was essential to rebut the charge, whether or not it was supported by evidence.

understandings were really secret or illicit quid pro quos for Mecom's Arctic purchase, as the Government contended.

(d) The purported 1969 negotiations with a major oil company: The Government argued to the jury that Cowett had not played any role in these negotiations and suggested that, in fact, no such negotiations had ever taken place. Indeed, the Government argued that King and Boucher had deliberately misled Cowett and FOF as to the value of the Arctic by telling them in the spring of 1969 that a major oil company was prepared to pay FOF $5.15 an acre for a substantial interest in the Arctic (D.Ex. S-1; Tr. 4278). This had a severe impact on appellants' credibility, because on cross-examination they were unable to identify the major oil company, since it appears the negotiations had been conducted by Cowett (Tr. 3077, 3645). Cowett would have been able to provide relevant testimony on this point. Conwill (another FOF director) testified that Cowett had mentioned the possibility of a partial sale to him in June of 1969 (Tr. 315-16), and Cowett's own grand jury testimony contained a reference to a "tentative agreement" with the Italian National Oil Company which had to be called off when FOF's accountants warned FOF of possible adverse tax consequences.

(e) The Raff transaction: The Government argued that this transaction had been effected by appellants in order to falsely impress FOF and IOS with their performance.

If Cowett were alive, he would have been able to confirm that he had not been misled. Cowett had direct contact with Raff subsequent to the sale (Tr. 749), and would have been able to state whether or not Raff had ever claimed that he had received promises from King or Boucher which had never been kept. Cowett could also have aided appellants' credibility by explaining the Raff transaction had no significant impact upon FOF's evaluation of KRC's performance and that just a few months after that transaction KRC, on the basis of subsequent drilling activity, recommended to FOF (through Cowett) a substantial downward revaluation of the properties sold to Raff (Tr. 2135-36).

(f) The Midwest Oil transaction: Cowett could have explained the origin of FOF's interest in acquiring Midwest Oil and the reasons why FOF (through Cowett) had insisted that the purchase should be conditioned upon Standard Oil's acquisition of 25% of FOF's interest in the Canadian Arctic at the same price ultimately paid by Mecom and COG. Moreover, King would hardly have been in a position to offer Standard Oil $40-$80 million of "under the table" business from FOF, as Swearingen claimed, unless King had received some indication from Cowett that FOF would cooperate with any such understanding. If Cowett had confirmed such an "under-the-table" offer by FOF, it would have shown that King had been working for FOF rather

than -- as the Government claimed at trial -- against it. On the other hand, if Cowett had denied such an offer (which is the defense position), then it would have been useful to the defense in challenging Swearingen's testimony and in supporting King's credibility.

(g) Failure to obtain Sproule Report: The Government argued at trial that appellants had somehow prevented FOF from obtaining an independent evaluation by Sproule of the Canadian Arctic properties as of December 31, 1969, because they allegedly knew that any such valuation would be at great variance with the purchase price paid by Mecom and COG. If true, this represented circumstantial evidence as to the non-bona fide nature of the Arctic transactions, and adversely affected appellants' credibility. Appellants maintained that, in fact, Boucher had offered to obtain such a report if it were needed by FOF (Tr. 2054), and that the decision not to seek such report was made by Cowett after extensive discussions with Arthur Andersen (Tr. 2061-64, 2316-17). Cowett could have explained the reasons why he decided not to obtain the report, and appellants submit that this testimony would have been consistent with their contentions that they were perfectly willing to cooperate in obtaining an independent review.

(h) In general: The plain fact is that appellants dealt almost exclusively with Cowett regarding the sale of properties to FOF and the Arctic revaluation. He was

the only person with knowledge of both sides of most aspects of the FOF-KRC relationship. Since the crime with which appellants were tried consisted in large part of allegations that they had misled and defrauded FOF (through lies to Cowett), it is absurd to say that the man who was the link between FOF and appellants could not have provided material testimony.

The prosecutor's principal response is that they feel they know what Cowett would have said had he been called as a witness, and that Cowett's testimony would have been that he had been defrauded. If the prosecutors were willing to be as candid as defense counsel was to Judge Frankel, they would be forced to admit that they can no better communicate with the dead than can the defense. There is no way that the prosecutors can state what Cowett would have said if he had been available. Indeed, the only testimony of Cowett that was available to the defense and related in any way to the Arctic was a segment of his July 1970 testimony before a New York grand jury. This was introduced at trial by the defense over the the Government's strenuous objections. As it was, the Government succeeded -- improperly -- in excluding from the portion of this prior testimony that was read to the jury certain segments which would have aided the defense by showing that Cowett had been well aware of the risks involved in FOF's Arctic investment (App. 1179 [line 8] through 1183 [line 22]). Most significantly,

Cowett had testified that in early 1970 the Imperial Oil Company of Canada had announced a sizeable oil find on the western side of the Canadian Arctic and that, in July 1970, various oil consortiums had undertaken drilling programs in areas adjacent to property owned by FOF. Cowett stated that in June 1970 rumors had circulated to the effect that additional oil reserves had been located, but that reliable information was not available because the companies involved were under no obligation to disclose any information on their activities until 1972. Nevertheless, Cowett believed that the prospects were good as a result of FOF's receipt of "a series of fairly high priced bids" for certain specific acreage it held in the Arctic. Indeed, if, as the Government argued to the jury, Cowett had been deceived by King about the Arctic's potential, the following comment by Cowett, given under oath approximately seven months after the revaluation, is most revealing:

> "Now, in sum and substance, I have not meant to paint a rosy picture. It is what we call an up and out crap shoot, but the gambling odds are getting better because there are things that have been found up there which indicate the presence of something. And it is getting to be a more and more interesting area for oil exploration and speculation." (App. at 1183) (Emphasis added)

It is a reasonable inference that, if Cowett had been alive, he could have supplemented this with testimony that King had discussed the Arctic "crap shoot" with him openly and candidly, and that neither Cowett nor FOF had been defrauded. This would have eliminated the Government's theory before the jury. Indeed,

the very likelihood of such testimony may well explain why criminal reference was not made in this case until <u>after</u> Cowett's death when the Government knew it could safely accuse the defendants of defrauding FOF. We submit that the prejudice resulting from such delay is clear and calls for dismissal.

POINT III

THE COURT'S REFUSAL TO INSTRUCT THE JURY AS TO THE INADMISSIBILITY OF MacKENZIE'S HEARSAY STATEMENT AGAINST KING WAS REVERSIBLE ERROR

In addition to the arguments raised in Point III of Boucher's Initial Brief (see also Point II of Boucher's Reply Brief), King submits that Neil MacKenzie's hearsay comment to Frederickson at a KRC board meeting in January 1971 to the effect that COG had paid KRC a "ridiculous" price for its Arctic interest was erroneously permitted to be used affirmatively against him. King was not present when the remark was made.

It is noteworthy that the Government is silent on this point in its brief, arguing instead (G. Br. at 114n) that the controversy over the MacKenzie statement only involves Boucher.

It is inconceivable that a jury could be expected to restrict its consideration of MacKenzie's statement to Boucher, and ignore it as to King, especially in view of the great emphasis which the prosecutor placed on the remark in his summations (App. 1345A, 1346-47). The "ruboff effect" of this hearsay testimony was severely prejudicial to King even when it was first introduced with a limiting instruction. See, e.g., Bruton v. United States, 391 U.S. 123 (1968); United States v. Zane, 495 F.2d 683, 694 (2d Cir. 1974). The effect became even more pronounced when the Court permitted the prosecutor unrestricted

use of the remark in summation and refused the request of King's counsel to repeat the requisite limiting instruction in his charge.

Moreover, the Government's contention that MacKenzie's remark was never admitted into evidence, but rather merely served as the background for Boucher's "admission by silence" is not only contrary to fact (see Point II of Boucher's Reply Brief), but also intensifies the error associated with the court's refusal to caution the jury. Since Boucher could not recall MacKenzie's remark, and had denied that he had agreed with it, the Court, at the very least, should have required the Government to produce MacKenzie to explain the purpose or bases of his statement, and whether it was said under circumstances which would have led MacKenzie to expect a response if Boucher had disagreed with him. The Government's failure to produce MacKenzie effectively deprived King of his right of confrontation on this issue. See Mancusi v. Stubbs, 408 U.S. 204 (1972); cf. Bruton v. United States, supra.

CONCLUSION

For the reasons set forth herein, appellant King respectfully requests the Court to reverse the conviction below.

Respectfully submitted,

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